No. 80-620

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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN J. AYOOB, HUGO IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners,

v.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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Respondents respectfully submit that the Petition For Writ Of Certiorari to the United States Court of Appeals for the Third Circuit seeking review of the judgment and opinion entered in this proceeding on July 29, 1980 be denied.

QUESTIONS PRESENTED

I. Should Certiorari issue to review whether judicial immunity bars §1988 award of attorneys fees (incidental to successful §1983 action for equitable relief) when the District Court has not yet fashioned such an award, and where in any event, the defendants subjected themselves to liability for prospective relief under 42 U.S.C. §1983 and, where there is no record below relative to the question which is the predicate to deciding the fees issue, that is, whether judicial immunity bars a §1983 suit for equitable relief.

II. Should Certiorari issue to review whether attorneys fees can be awarded to a non-profit legal services program, which did not charge a fee to the litigant, where such issue has previously been decided in the affirmative by this Court.

III. Should Certiorari issue to review factual question of whether plaintiffs were prevailing parties for purposes of 42 U.S.C. §1983 when such question was decided in the affirmative by the District Court and affirmed by Circuit Court of Appeals, particularly when defendants offered no testimony in rebuttal to plaintiffs counsel's testimony that the lawsuit was a material factor in bringing about a change in defendant's conduct.

IV. Should Certiorari issue to review question of the propriety of fashioning a §1988 attorneys fees award against a state agency which represented the named defendants and actively participated in all phases of the litigation, when similar issue was recently decided in the affirmative by this Court in Hutto v. Finney.

TABLE OF CONTENTS

Page

Statement of Question Presented . . . . . -i-

Table of Contents . . . . . -ii-

Table of Authorities. . . . . -iv-

Summary of Argument . . . . . -ix-

Statement of the Case . . . . . -1-

Argument

I. Reasons for Denying Writ as to Issue of Judicial Immunity from §1988 award of attorneys fees . . . . . -10-

A. Issue Not Ripe For Review . . . . . -10-

B. Essential Question Not Addressed Below . . . -11-

C. Case can be decided on grounds other than judicial immunity . . . . -17-

D. No Compelling Reasons why Immunity Should Bar Fees . . . . . -21-

II. The Court Should not grant Certiorari on the Issue of Whether an Award of Attorneys Fees is Appropriate in Circumstances where the litigant does not actually incur any fee since the Court only last term decided that issue in the affirmative . . . . . -31-

TABLE OF CONTENTS

Page

III. The Court should not issue a Writ of Certiorari on the Issue of Whether Plaintiffs were prevailing parties since it is a factual question which was resolved affirmatively by the District Court and Circuit Court of Appeals. . .-34-

IV. The Court should decline to issue a Writ of Certiorari to determine the appropriateness of assessing Attorneys Fees against the Government since that Issue was recently decided by the Court in Hutto v. Finney. . . . . .-35-

Conclusion . . . . . .-37-

TABLE OF AUTHORITIES

CASES	Page
Adickes v. S.H.Kress & Co., 398 U.S. 144 (1970)	15
Alma Motor Co. v. Tinkin Detroit Axle Co., 329 U.S. 120 (1946)	21
Argersinger v. Hamlin, 407 U.S. 25 (1972)	11
Baker v. Carr, 369 U.S. 186 (1962)	29,30
Barr v. Mateo, 355 U.S. 171 (1957)	21
Bauers v. Heisel, 361 F.2d 581 (3d. Cir. 1965)	29,30
Bivens v. Six Unknown Named Agent of Fed. Bur. of Narc., 403 U.S. 388 (1971)	15
Brandenburger v. Thompson, 494 F.2d 885 (1974)	33
Bradley v. Fisher, 13 Wall. 335 (1872)	23
Branti v. Finkel, ____ U.S. ____, 100 S.Ct. 1287 (1980)	34
Duignan v. United States, 274 U.S. 195 (1927)	15
Enginemen v. Bangor & A.R.Co., 389 U.S. 327 (1967)	10

TABLE OF AUTHORITIES (CONTINUED)

Page

Fitzpatrick v. Bitzer, 427 U.S. 678 (1976). 29,30

Gomez v. Toledo, ____ U.S. ____, 100 S.Ct. 1920 (1980). 18

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949). 34

Green v. James, 473 F.2d 660 (9th Cir. 1973). 18

Hamilton-Brown Shoe Co. v. Wolf Brothers & Company, 240 U.S. 251 (1916). 10

Heimbach v. Village of Lyons, 597 F.2d 344 (2d Cir. 1979). 24

Hutto v. Finney, 437 U.S. 678 (1978) 25,29,30,35

Imbler v. Pachtman, 424 U.S. 409 (1976) 23,26,27,28

Jordan v. Fusari, 496 F.2d 646 (2d. Cir. 1974). 33

Mirin v. Justices of the Supreme Court of Nevada, 415 F.Supp. 1178 (D.Nev. 1978) 14

Mitchum v. Foster, 407 U.S. 225 (1972) 17

Monroe v. Pope, 365 U.S. 167 (1961) .29

TABLE OF AUTHORITIES (CONTINUED)

Page

New York Gaslight Club, Inc. v. Carey, ____ U.S. ____, 100 S.Ct. 2024 (1980). 30,32

NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) 15

Pierson v. Ray, 386 U.S. 547 (1967) 23,26,27,28

Reynold v. Cooney, 567 F.2d 1166 (1978). 32

Rodriquez v. Taylor, 569 F.2d 1231 (3rd. Cir. 1977). 31

Scheuer v. Rhodes, 416 U.S. 232 (1974) 27,28

Sears, Roebuck & Co. v. Carpet Layers Union, 397 U.S. 655 (1970). . .16

SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972) 16

Singleton v. Wulff, 428 U.S. 106, 121 (1976) 15

Star Distributors, Ltd. v. Marino, 613 F.2d 4 (2d. Cir. 1980) 24

Supreme Court of Virginia v. Consumers Union of the United States, ____ U.S. ____, 100 S.Ct. 1967 (1980). 12,20,22,25

TABLE OF AUTHORITIES (CONTINUED)

	Page
Torres v. Sacks, 538 F.2d 10 (2d. Cir. 1976)	32,33
United States v. McCleod, 385 F.2d 234 (8th Cir. 1967)	14
Wagner v. Fawcett Publications, 307 F.2d 409 (7th Cir. 1962)	19
Wood v. Strickland, 420 U.S. 208 (1975)	14,27,28
Younger v. Harris, 402 U.S. 37 (1971).	13
STATUTES	
Federal	
U.S. Const. art. IV, §4	28,29
U.S. Const. amend. XI	29
U.S. Const. amend. XIV	29,30
42 U.S.C. §1983 (Supp. 1980)	2,11,12,14, 16,17,18,19, 25,27,28,29
42 U.S.C. §1988 (Supp. 1980)	1,11,13,15, 17,20,25,30, 31

TABLE OF AUTHORITIES (CONTINUED)

	Page
State	
42 Pa.C.S. §1515	2
Other	
Federal	
Fed.R.Civ.P. 8(a)	19
State	
Pa.R.Crim.P. 65, 318	11
Reports of the United States Senate and House of Representatives	
S.Rep. No. 94-1011, 94th Cong., 2d. Sess.1, 1976	19,20,24,25
H.R. Rep. No. 94-1558 94th Cong., 2d. Sess.	12,13,25,27, 28
Other Authorities	
Wright & A.Miller, Federal Practice and Procedure: §1271	15,19

SUMMARY OF ARGUMENT

I. Certiorari should not issue to decide question of whether judicial immunity bars §1988 award of attorneys fees

A. Certiorari should not issue to decide question which is not ripe for review. The Circuit Court's remand left open question of against whom the award of attorneys fees should be fashioned; and the District Court has not fashioned such an award against the defendants. Therefore, the question of whether an award of attorneys fees is barred by judicial immunity is not ripe for review.

B. In order to decide if judicial immunity bars an award of fees in the present case, the Court must first decide whether such immunity bars §1983 suits for equitable relief. This issue, however, was not raised below or addressed by the District Court or Circuit Court of Appeals; it may also be moot. The Court therefore should not issue certiorari, since the predicate to deciding the fees issues it not properly before it.

C. Attorneys fees are integral to a successful action for §1983 equitable relief. The defendants waived any immunity defenses they may have had from such relief. Plaintiffs, therefore, as prevailing parties in a §1983 action for equitable relief, to which no immunity defenses were raised, are entitled to an award of attorneys fees. Certiorari should not be granted, therefore, since this case does not squarely present issue of whether judicial immunity bars §1988 attorneys fees awards.

D. §1988 attorneys fees awards are not the equivalent of damages, and, therefore judicial immunity does not apply. In Consumers Union, the Court rejected the notion that fees and damages were equivalent by holding that fees could be assessed against the Virginia Supreme Court in its enforcement capacity for which it enjoyed absolute immunity from damages. Similarly, since the same reasons underlie prospecutorial immunity as support judicial immunity, the Court implicitly re-

jected the argument that an award of attorneys fees (incidental to prospective relief) interferes with judicial or prosecutorial independence. Moreover, the Congressional history completely supports the conclusion that attorneys fees, incidental to a successful action for equitable relief, should be awarded in circumstances where immunity would bar an action for damages.

II. Certiorari should not issue to review question whether attorneys fees can be awarded to non-profit legal services

A public interest, nonprofit law firm is entitled to an award of attorneys fees incidental to a successful §1983 action for equitable relief.

In Gomez v. Toledo, ___ U.S. ___, 100 S.Ct. 1920, 1924 (1980), the Court relying on the legislative history to §1988 held that a public interest law firm, which did not charge a fee to a litigant, was entitled to an award of attorneys fees under §706K of the Civil Rights Act. Therefore, since the Court

has recently decided the issue, no reasons exist for the Court to review the question in this case.

III. Certiorari should not issue to review question of whether Plaintiffs were prevailing party

Certiorari should not issue to review question of whether plaintiffs were prevailing parties since it is a factual question which has been decided in the affirmative by the District Court and Circuit Court of Appeals. Particularly, since, defendants did not offer any testimony in rebuttal to plaintiffs' counsel's testimony that the lawsuit was a material factor in eliminating defendants' illegal conduct.

IV. Certiorari should not issue to review question of whether fees can be awarded against state agency

The defendants were represented by the local and state court Administrator's Office. The Circuit Court specifically noted that these agencies actively participated in all phases

of the proceedings. Under such circumstances, there is no merit to the contention that an award of attorneys fees against such agencies would violate due process. Moreover, the legislative history to §1988 explicitly recognized that fees would be awarded against the state or its agencies. Finally, the present case is controlled by the Court's decision in Hutto v. Finney, which specifically upheld such awards against the state.

STATEMENT OF THE CASE

This case principally involves the issue of whether plaintiff's counsel was entitled to attorneys fees pursuant to the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. §1988 (Supp. 1980) "§1988". The following discussion deals with both the underlying proceedings as well as the subsequent proceedings involving counsel fees. Plaintiff's counsel through all proceedings below was the Neighborhood Legal Services Association, Inc., a non-profit corporation funded by public and private grants.

A. Underlying Proceedings (§1983)

In March, 1978, Patricia Morrison and other named plaintiffs filed a class action against John J. Ayoob and certain other district justices from Beaver County, Pennsylvania, seeking to enjoin and declare

unlawful defendants' common practice of allegedly jailing indigent persons for petty and/or summary offenses without first affording them a right to obtain counsel.[1/] This conduct was alleged to violate plaintiffs' rights under 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution. See, Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006 (1972). A claim that the challenged conduct violated state law was also advanced. (4a)

Both the claim and the relief sought were narrowly defined. In their complaint and amended complaint the plaintiffs sought only equitable and declaratory relief. The

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1/ District Justices were formerly known as district magistrates or justices of the peace. District justices are, with limited exceptions, elected judicial officers and their jurisdiction is limited by statute to minor civil and petty and/or summary criminal matters. See, Act of July 26, 1976 P.L. 586, No. 142, §2, eff. June 26, 1978. As amended by the Act of April 28, 1978, P.L. 202, No. 53, §10, eff. June 28, 1978, 42 Pa.C.S. §1515, which outlines the jurisdiction of district justices.

district justices were sued solely in their official capacities.

By a memorandum and order dated May 31, 1978, the lower court denied a motion to dismiss the complaint which was filed by Jonathan Vipond, III, Esquire, a staff attorney for the Administrative Office of the Pennsylvania Courts (hereafter Administrative Office). (21a)[2/]

Following the district court's May 31, 1978 order, the defendants filed an answer (24a) and the plaintiffs began to engage in discovery.

On August 4, 1978, the plaintiffs moved the lower court for a preliminary in-

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2/ The sole ground advanced by the Administrative Office for dismissing this action was a claim that the district court was required to abstain. No other defenses were asserted. (13a; 17a) [Bracketed citations throughout Statement of the Case refers to pages in the appendix filed in the Court of Appeals.]

junction. (36a) However, no hearing on this motion was ever held because the parties, under the district court's guidance, engaged in a series of negotiations designed to resolve the merits of the litigation.

Finally, as Judge Knox found,

> "the case progressed to the point where the Administrative Office of the Court in Beaver County and the President Judge thereof admonished the district justices that they had to comply with the requirements of the Pennsylvania Supreme Court and the requirements of Argersinger and the practice thereupon ceased ..." (emphasis added) (125a)

It appearing to the district court that the action of the various court officials had removed any need for further proceedings it, with the concurrence of the plaintiffs, granted defendants' motion to dismiss the case as moot. (63a-72a)

This order specifically noted that the plaintiffs did not intend to waive their right to seek counsel fees as a prevailing party pursuant to the Fees Act. (72a)

B. Counsel Fee Proceedings

On December 11, 1978, plaintiffs' counsel filed a motion for attorneys fees. (73a) Attached to the petition were detailed accounts describing the activities and hours for which fees and other costs were being sought. (75a-78a)

No fees were sought against the district justices in their individual capacities. Instead, fees and other costs were sought against the Administrative Office which supervises the defendants and which had also defended the district justices throughout the underlying proceedings.[3/]

3/ Various counsel entered appearances on behalf of the defendants in this matter. However, each counsel was attached to a court administrative office or was acting purely as local counsel. Robert J. Taylor, Esquire was from the Administrative Office of Beaver County Courts. Jonathan Vipond, III, Esquire was from the Administrative Office. David Brakoniecki, Esquire entered his appearance as local counsel for Mr. Vipond. (See Docket Entries). It was Mr. Vipond who assumed primary responsibility for defending the conduct of the district justices and for contesting the fee petition filed by the plaintiffs' counsel.

(footnote continued)

On January 30, 1979, the lower court held a hearing on plaintiffs' fee petition. Thereafter (the Administrative Office having raised the issue of immunity for the first time) the trial court directed briefs to be submitted on the issue of whether the doctrine of judicial immunity barred an award of fees and costs against the agency which supervised the district justices and had also defended their challenged activities.

On March 27, 1979, having previously indicated that plaintiffs' counsel had shown a prima facie case for fees (94a), the trial court held a further hearing on the fee petition. At this hearing evidence was presented only on the issue of whether the plaintiffs were prevailing parties under the Fees Act. During the hearing the parties

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3/ (footnote continued)

This was done in his capacity as a staff attorney for the Administrative Office. (See Comments of district court, 21a)

stipulated that: (1) $4,578.45 represented a fair and reasonable figure for costs and counsel fees if such were ultimately awarded by the district court (117a-118a; 12a)[4/] and, that plaintiffs would waive costs and fees for any additional collateral matters which might develop in the lower court but were reserving the right to seek additional fees and costs in the event either party filed an appeal from an order dealing with the December 11, 1978 petition for fees and costs.[5/]

4/ Plaintiffs' counsel claimed general costs of $158.45 and specifically claimed reimbursement for 110.5 hours of professional time at a rate of $40.00 per hour. (75a-78a)

5/ There existed the possibility of a brief collateral proceeding in the lower court resulting from a petition to vacate the lower court's dismissal order of October 20, 1978, which was presented by the plaintiffs after the fees petition had been filed and which alleged that defendant John J. Ayoob continued to engage in the challenged conduct despite assurances that such conduct had ceased (80a). Although at the March 27, 1979 hearing it appeared to all concerned that a consent order would be shortly entered which would resolve the petition to vacate (123a), events were such

(footnote continued)

By an order dated May 24, 1979, the Honorable William W. Knox denied plaintiffs' counsel's request for attorneys fees (125a). Although Judge Knox concluded that the plaintiffs were the prevailing party he concluded that he would not exercise the court's discretion to award fees.

A timely appeal was taken to the Court of Appeals for the Third Circuit. Jurisdiction of the appeal existed pursuant to 28 U.S.C. §1291 (1976). On July 29, 1980, that Court reversed the decision of the district court, ruling that "judicial immunity is not a factor to be considered under §1988".

5/ (footnote continued)

that the parties were unable to secure a formal signing of a consent agreement until June 25, 1979 (130a). Thereafter, a petition filed jointly by the parties to this proceeding was lodged with the Court requesting remission of the record to enable the lower court to formally enter the consent agreement as an order.

Slip Opin. at 8. The court also rejected the defendants' alternative positions in support of the district court's order denying the application for fees. The case was remanded to the district court for a determination of who should be directed to pay the award of fees, and for the entry of a proper decree. The district court was authorized, if it saw fit, to give further consideration to the reasonableness of the amount of the fees claimed, notwithstanding that this had not been an issue in the trial court. A stay of the Circuit Court's mandate was obtained to allow the filing of the Petition for Certiorari.

ARGUMENT

I. REASONS FOR DENYING THE WRIT

A. The Issue of Judicial Immunity is not ripe for Consideration by the Court since the Circuit Court remand did not specify against whom the Award was to be made

The Circuit Court remanded the cause to the district court to an enter an award of attorneys fees consistent with its opinion. The Court left open the issue of whom the award of attorneys fees could be assessed, noting that, arguably, either the local or state court Administrator's Office could be responsible for the award. The exact nature of the award of attorneys fees, however, has not yet been fashioned, therefore, it is premature to address the question of whether judicial immunity bars an award of attorneys fees in this case. The Court should not grant certiorari to address issues that are not ripe for review. Enginemen v. Bangor & A.R. Co., 389 U.S. 327 (1967); Hamilton-Brown Shoe Co. v. Wolf Brothers & Company, 240 U.S. 251, 257-258 (1916).

B. The Court should not grant Certiorari where an essential issue necessary to determine the cause was not raised below nor addressed by either the District Court or Circuit Court of Appeals

The Court is asked to grant certiorari on the question of whether the doctrine of judicial immunity bars an award of attorneys fees under 42 U.S.C. §1988.[6/] The record in this case is devoid of those factors, both legal and factual which would support such an exercise of this Court's discretion; the petition should, therefore, be denied.[7/]

6/ The Civil Rights Attorneys' Fees Awards Act of 1976 amended 42 U.S.C. §1988 to provide in relevant part: "In any action or proceeding to enforce a provision of section...1983...of this title...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs."

7/ Since the defense of judicial immunity from §1983 injunctive relief was not raised the Court is without the factual or legal development on such issues as whether the district justices failure to comply with Argersinger v. Hamlin, 407 U.S. 25(1972) and Pa.R.Crim.P., 65, 318, were ministerial acts for which judicial immunity would not apply.

The propriety of a fees award under §1988 in the face of a judicial immunity claim cannot be determined except by an assessment of that claim with respect to the underlying action under 42 U.S.C. §1983. In Supreme Court of Virginia v. Consumers Union, ___U.S.___, 100 S.Ct. 1967 (1980) this Court decided that an award of attorneys fees is appropriate in those cases in which prospective relief could properly be awarded against the defendant.8/

In citing the legislative history, the Court stated:

> "The House Committee report on the Act indicates that Congress intended to permit an award of attorneys'

8/ The Court in Consumers Union found that an award of prospective relief against state officials acting in their legislative capacity was barred by the doctrine of legislative immunity, hence, an award of fees would also be improper. Id. at 1975.

> fees in cases in which prospective relief was properly awarded against the defendants who would be immune from damage awards. H.R.Rep. No. 94-1558, 94 Cong.2d Sess. 9, 1976...." Id. at 1978

Therefore, in the present action, to determine if an award of attorneys fees can be granted pursuant to "§1988" the Court must first decide if Congress abrogated judicial immunity from suits brought under 42 U.S.C. §1983.

In the present case, however, the district justices never objected to the §1983 claim for prospective relief.[9/] The issue was never addressed by either the District

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9/ The District Justices, represented by a staff attorney for the Pennsylvania Court Administrator's Office filed a 12(b) motion to dismiss solely on the abstention doctrine (Younger v. Harris, 401 U.S 37 (1971)). Their answer, filed by the local court administrator's office, likewise made no reference to a judicial immunity defense. Indeed the justices did not even raise the §1983 immunity issue as a defense to the attorneys' fees claim at issue here.

Court or the Circuit Court of Appeals.[10/] Therefore, the Court must decide an issue which is not properly before it. Under such circumstances the Court should not grant certiorari.

It is well established that the Court will not ordinarily consider issues neither

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10/ Indeed, in its brief to the Circuit Court of Appeals, the District Justices made it clear that they did not oppose an award of declaratory and injunctive relief sought pursuant to 42 U.S.C. §1983.

> "There is no need...for the Court to decide whether judicial immunity applies to awards of injunctive or declaratory relief. Compare Mirin v. Justices of the Supreme Court of Nevada, 415 F.Supp. 1178 (D.Nev.1978), with United States v. McCleod, 385 F.2d 234 (8th Cir. 1967). The rationale underlying judicial immunity arguably would not be defeated by permitting injunctive and declaratory remedies against judges, because the prospect of such decision-oriented remedies would not influence a judge's decision any more than would the prospect of an appellate reversal. Cf. Wood v. Strickland, 420 U.S. 208 (1975).

raised before nor considered by the courts below. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n.2 (1970). As explained in NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 163, 164 (1975) where the court refused to consider an issue not raised in the District Court:

> "Thus, not only are we unenlightened on the question...as factual matter...but we are without a lower court opinion on the legal issue, under such circumstances, we normally decline to consider a legal claim." Ramsey v. Mineworkers, 401 U.S. 302, 91 S.Ct. 1598 (1971); Adickes v. S.H. Kress & Co. ..." (See infra. fn. 7)

See also, Duignan v. United States, 274 U.S. 195, 200 (1927); Singleton v. Wulff, 428 U.S. 106, 121 (1976); Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 403 U.S. 394, 397, 398 (1971).

The Court, therefore, should decline to grant certiorari on the issue of whether an award of attorneys' fees sought pursuant to 42 U.S.C. §1988 is barred by the doctrine of judicial immunity since the predicate to deciding that question, i.e., whether pro-

spective relief under 42 U.S.C. §1983 could be granted against defendants, was not properly preserved by the District Justices for this Court's review.

Moreover, the District Justices admit in their petition (P.38, fn.13) that this case does not properly present the issue of whether judicial immunity bars §1983 suits for prospective relief. They also assert that the issue of prospective relief is moot. (P.27, fn.8). The Court should not exercise its discretion to review a case in which an essential issue is not properly before it, and which may be moot; the petition therefore, should be denied. Sears, Roebuck & Co. v. Carpet Layers Union, 397 U.S. 655 (1970); SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972).

C. The Court should not grant Certiorari to decide the issue of whether judicial immunity bars an award of attorneys'fees since the case can be decided on other grounds without reaching that question

The award of attorneys'fees under 42 U.S.C. §1988 is premised upon the appropriateness of the underlying action for prospective relief sought pursuant to 42 U.S.C. §1983. As asserted infra. at pp. 11-16, that issue is not properly before the Court since it was neither raised below or addressed by the District Court or Circuit Court of Appeals. Assuming arguendo, however, that judicial immunity was a bar to an action for equitable relief under 42 U.S.C. §1983, the plaintiffs would nonetheless be entitled to an award of attorneys fees in the present action.[11/]

11/ Plaintiffs submit that in enacting 42 U.S.C. §1983 Congress intended to abrogate the doctrine of judicial immunity from suits brought under 42 USC §1983. Mitchum v. Foster, 407 U.S. 225 (1972). Accordingly, plaintiffs would be entitled to an award of attorneys' fees under the Court holding in Consumers Union, supra., at 1978.

Such an award is proper based upon defendants waiver of any immunity defenses which they might have had from liability for prospective relief under 42 U.S.C. §1983. This case, therefore, does not squarely present the issue of whether the doctrine of judicial immunity bars an award of attorneys fees since the Court need not reach the question in order to dispose of the case.

The defense of judicial immunity was first raised in opposition to plaintiffs' motion for an award of attorneys fees. It was never raised, however, against the underlying action for declaratory and injunctive relief.[12/]

12/ The doctrine of judicial immunity, like other affirmative defenses, must be pleaded and proved by the party asserting the defense. Rule 8(a) FRCP (Defendant must plead any "matter constituting an avoidance or affirmative defense"). Gomez v. Toledo, ___ U.S. ___, 100 S.Ct. 1920, 1924 (1980), (defendant must plead affirmative defense of qualified immunity); Green v. James, 473 F.2d 660 (9th Cir. 1973)(defendant must plead affirmative defense of absolute immunity). See also Wright & A. Miller,

(footnote continued)

(See fn. 3, infra.) The District Justices in fact agreed that judicial immunity did not bar an award of declaratory and injunctive relief. (See fn. 2, infra.)

The District Justices having failed to object to the underlying §1983 action for declaratory and injunctive relief, cannot now object to an award of attorneys fees; since such an award flows from and is integral to that action. The legislative history is clear:

> "In several hearings...the Committee has found fee awards are essential if the Federal statutes to which S.2278 applies are to be fully enforced. We find that the effects of such fee awards are ancillarly and incident to securing compliance with these laws,

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12/ (footnote continued)

Federal Practice and Procedure: §1271 (1969). A failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case. Wagner v. Fawcett Publications, 307 F.2d 409 (7th Cir. 1962) cert. denied, 372 U.S. 909 (1963); Golden Oil v. Exxon Co., U.S.A., 543 F.2d 548 (5th Cir. 1976).

> and that fee awards <u>are an integral part of the remedies</u> necessary to obtain such compliance." (Emphasis added) LEG. HIST. 5 (Senate Report)

Similarly, in <u>Consumers Union</u>, supra, at 1978, the Court cited the House Committee report evidencing Congress' intent to permit fee awards in cases in which prospective relief was awarded against defendants. Moreover, it is unnecessary to obtain a final judgment against the defendant to be entitled to an award of fees under 42 U.S.C. §1988. It is sufficient if the litigant succeeds in the case by such means as a consent decree or by the defendants' voluntary cessation of the illegal conduct. LEG. HIST. 7 (House Report).

In the present action both the District Court and the Circuit Court of Appeals found that plaintiffs were prevailing parties. As stated by the Circuit Court:

> "This sequence of events strongly suggests that the action was a material factor in bringing about the defendant's change in conduct." Slip Opinion 5

The plaintiffs as the successful party in a §1983 action for equitable relief in which the defendants did not assert immunity from such relief, are entitled to an award of attorneys fees. The issue of whether the doctrine of judicial immunity bars an award of attorneys fees is,consequently,not squarely presented in this case. The Court, therefore, should refuse to grant certiorari and the petition should be denied. Alma Motor Co. v. Tinkin-Detroit Axle Co., 329 U.S. 120 (1946); Barr v. Mateo, 355 U.S. 171 (1957).

D. Certiorari should not be granted since District Justices have failed to assert any compelling reasons why doctrine of judicial immunity should bar an award of attorneys fees under 42 USC §1988

1. Fees are not the equivalent of damages

The District Justices assert that the doctrine of judicial immunity which bars an award of damages against judges acting in their judicial capacity likewise bars an award of attorneys fees against judges so acting,

claiming that such fees are the functional equivalent of damages.

This reasoning, if accepted, would prevent the award of attorneys fees in any case where the defendant can claim immunity from damages. If fees are equivalent to damages as against judges, then fees must also be equivalent to damages as against other officials asserting immunity.

In Consumers Union, the Court held that prosecutorial immunity from damages did not bar an award of attorneys fees against the Virginia Supreme Court acting in its enforcement capacity. Thus, the argument that attorneys' fees are equivalent to damages is directly contrary to the decision in Consumers Union.

Therefore, a writ of certiorari should not issue based on the argument that fees are equivalent to damages.

2. Attorneys' Fees do not Interfere with Judicial Independence

The doctrine of judicial immunity is based on the belief that judicial officers

will not perform their responsibilities independently if they are subject to personal liability in a suit for damages. Bradley v. Fisher, 13 Wall 335 (1872); Pierson v. Ray, 386 U.S. 547 (1967). The Petitioners' argument that an award of attorneys' fees will have a chilling effect upon judicial conduct is based on a similar premise. The Court in Consumers Union, however, implicitly rejected such a notion.

The freedom to act independently and without fear of personal liability underlies the absolute immunity from damages enjoyed by both judges and prosecutors. Imbler v. Pachtman, 424 U.S. 409, 423 (1976).[13/] If personal liability results from an award of attorneys' fees; then, such an award could not have been assessed agaist the Virginia Supreme Court acting in

13/ Indeed this Court has stated that the judgment of prosecutors and judges is functionally equivalent: "It is the functional comparability of their judgments to judges that has resulted in ... prosecutors being referred to as quasi-judicial officers..." Id. at 423, fn. 20.

its prosecutorial capacity. The Court, however, decided to the contrary; and, therefore, rejected any argument that an award of attorneys' fees imposes personal liability on the official in question. If no personal liability is imposed, the doctrine of judicial immunity does not apply.[14/] Further, Congress' intent that state officials would not be personally liable for an award of attorneys' fees is clear from the Senate Report which accompanied S.2278.[15/]

> "In such cases it is intended that attorneys' fees like other items of costs, will be collected either from

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14/ The courts conclusion that legislative immunity barred §1983 suits for equitable relief does not support a similar conclusion as to judicial immunity since common law legislative immunity is unique in that it is similar in origin and rationale to that accorded Congressman under the Speech or Debate clause. That judicial immunity from §1983 suits for equitable relief can be treated differently from legislative immunity from such suits is evident from the decisions of the Second Circuit, compare, Star Distributors, Ltd. v. Marino, 613 F.2d 4 (2nd Cir 1980) barrring §1983 injunctive suits against legislators, and Heimbach v. Village of Lyons, 597 F.2d 344 (Ca.2, 1979) holding that judicial immunity does not extend to such suits.

15/ S.2278 was the Senate substitute for H.R.

(footnote continued)

> the official in his official capacity from funds of his agency or under his control, or from the state or local government. (Whether or not the agency of local government is a named party) (footnote omitted) LEG. HIST.11 (Senate Report)." Cited with approval in Hutto v. Finney, 437 U.S. 678 (1978)

In the typical case, a named individual's office of government acts as a surety for any costs that might be awarded to a prevailing plaintiff.[16/] In the instant case, no fees were sought directly from the pockets of the defendants. Instead fees were sought only from the State agency (administrative offices of

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15/ (footnote continued)

15460 and with one minor amendment became Pub.L. 94-559. The history of both S.2278 and H.R. 15460 are to be read together as the joint history of Fees Act. See Remarks of Rep. Drinan, LEG. HIST. 254 (112 Cong.Rec.H. 12159, daily ed. 10/1/76).

16/ The "surety" role of state and local governments was certainly something Congress was very aware of. Some of the best evidence of this intention came from the Act's opponents. See Remarks of Sen. Helms who in seeking to amend the Act to make governments immune advised his colleagues that, "it was unwise to provide that liability in these amounts (for fees) be assumed by...governments" (Emphasis added) LEG. HIST. 78-79 (122 Cong.Rec. S.16432, daily ed. 9/22/76).

the Pennsylvania Courts) which represented the defendants in the underlying proceedings.

The potential for personal consequences, never entered the picture during the fees proceedings. Therefore, the claim that an award of attorneys' fees may have a chilling effect on judicial conduct is unwarranted and provides no basis for applying the doctrine of judicial immunity to an award of attorneys fees. Moreover, the failure to claim judicial immunity from the §1983 suit for equitable relief very strongly suggests that such actions do not interfere with the functioning of the District Justices. (See fn. 10, infra.)

3. Legislative History

The District Justices next assert that the legislative history relied upon by the Circuit Court does not support the conclusion that Congress intended to abrogate judicial immunity as a defense to an award of attorneys' fees pursuant to §1988. It is claimed that the footnote to Pierson v. Ray, in H.R.

94-1558[17/] is ambiguous since that case dealt with special defenses as well as judicial immunity, and therefore, cannot be relied upon for proposition that Congress intended to abrogate the doctrine of judicial immunity as a defense to an award of attorneys fees. (See Pet., pp. 35-43). Even though Pierson dealt with both judicial and official immunity concepts, it was, as of October, 1976, the only Supreme Court decision holding judges immune from 42 U.S.C. §1983 damages claim. Moreover, the only reason to include Pierson as a citation would have been

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17/ "Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460 it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. [Wood v. Strickland; Scheuer v. Rhodes; Pierson v. Ray]. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if federal civil and constitutional rights are to be adequately protected. To be sure in a large number of cases brought under the provisions covered by H.R.15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees." LEG.HIST. 9 (House Report) (emphasis added)

as authority for immunity doctrines which "preclude the damage remedy." Neither Wood v. Strickland, nor Scheuer v. Rhodes (the other cases cited in the footnote) are appropriate authority for absolute immunity--instead, these cases are authority for "special defenses" which "limit the damage remedy." (See LEG.HIST. 9, House Report) Therefore, it is obvious that Pierson v. Ray, was cited in the legislative history to demonstrate Congress' intent to allow an award of attorneys' fees pursuant to §1988 against officials who have judicial immunity from damages.

4. Congress has the Authority to Abrogate Judicial Immunity from an Award of Attorneys Fees sought Pursuant to 42 U.S.C. §1988

The District Justices argue that Congress cannot abrogate judicial immunity enjoyed by state judges because of the principles of separation of powers embodied in the "guarantee clause" of Article IV, Section 4 of the United States Constitution.

Even if judicial immunity has a constitutional basis, which it does not[18] Congress could abrogate that immunity under the Fourteenth Amendment.

The Fourteenth Amendment expressly empowers Congress to enforce its provisions against the State. Monroe v. Pape, 365 U.S. 167 (1961). The Court has consistently held that Section 5 of the Fourteenth Amendment enables Congress to abrogate state government immunities when necessary to ensure its enforcement. See Fitzpatrick v. Bitzer, 427 U.S. 678 (1976) and Hutto v. Finney, supra. (Congress has the power under Section 5 to abolish sovereign immunities enjoyed by the states under the Eleventh Amendment).

18/ The Petitioner's assertion that judicial immunity is inherent to a republican form of government is incorrect. The authority of a republication form of government guaranteed under Article 4, Section 4, are determined by Congress and elected representatives of the people. The petitioner's claim that Article 4, Section 4 guaranteed state judges immunity from suits for prospective relief raises a non-justiciable question. Baker v. Carr, 369 U.S. 186, 218, 225 (1962). Moreover, in the case cited by Petitioner, Bauers v. Heisel, 361 F.2d 581, 588-589 (3d. Cir. 1966) the Court admitted that the "guarantee of a republican form of government" clause was non-justiciable.

In New York Gaslight Club, Inc. v. Carey, ___ U.S. ___, 100 S.Ct. 2024 (1980), the Court rejected a Tenth Amendment argument that an award of attorneys fees under §706K of the Civil Rights Act of 1964 infringes upon the states power.

> "We must reject petitioners Tenth Amendment argument. Congress' power under §5 of the Fourteenth Amendment is broad, and overrides any interest the State might have in not authorizing awards for fees in connection with state proceedings. See Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565; Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666" Id/ at 2032 (emphasis added)

The decision in New York Gaslight Club, Inc., applies to fees sought under §1988.[19/] Congress therefore can clearly abrogate judicial immunities to allow for an award of attorneys' fees under §1988.

19/ Civil Rights Attorneys Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. §1988 ... is legislation similar in purpose at and designed to Title VII's fee provision. See. H.R. Rep. No. 94-1558, pgs. 5 and 8, n.16 (1976). Id. at 20374, n.9.

II. THE COURT SHOULD NOT GRANT CERTIORARI ON THE ISSUE OF WHETHER AN AWARD OF ATTORNEYS FEES IS APPROPRIATE IN CIRCUMSTANCES WHERE THE LITIGANT DOES NOT ACTUALLY INCUR ANY FEE SINCE THE COURT ONLY LAST TERM DECIDED THAT ISSUE IN THE AFFIRMATIVE

The District Justices assert that there exists no justification for an award of attorneys fees in circumstances where the litigant has not actually incurred any legal fees. The Court is asked to address this issue because defendants contend that Rodriquez v. Taylor, 569 F.2d 1231 (3rd. Cir. 1977) cert. denied, 436 U.S. 913 (1978), was improperly relied upon by the Circuit Court in awarding attorneys fees to the plaintiffs.[20/] The Court, however, has recently addressed this question, and therefore, it is not necessary to grant certiorari to decide that issue in the instant controversy.

20/ In Rodriquez attorneys fees were awarded to a public interest law firm under the Fair Labor Standards Act. Petitioner contends that Rodriquez, does not provide authority for an award of attorneys fees to a public interest law firm under §1988 because such an award is discretionary while under the Fair Labor Standards Act an award of attorneys fees is mandatory.

In New York Gaslight Club, Inc., supra, at 2034, n.9, the Supreme Court expressly rejected any contention that an award of attorneys' fees was inappropriate because the litigant was represented by a public interest law firm:

> "We also reject petitioners argument...that respondents representation by a public interest group is a special 'circumstance' that should result in a denial of counsel fees. Federal Court of Appeals' decisions are to the contrary. See e.g., Reynolds v. Cooney, 567 F.2d 1166; Torres v. Sacks, 538 F.2d 10, 13 (Ca.2, 1976), Congress endorsed such decisions allowing fees to public interest groups when it was considering and passed, the Civil Rights Attorneys' Fees Award Act of 1976, 90 Stat. 2641 42 U.S.C. §1988, which is legislation similar in purpose and design to Title VII's fee provision. See H.R. Rep. No. 94-1558, pp. 5 and 8, n.16 (1976)."

In Torres v. Sacks cited above with approval, the Fourth Circuit Court of Appeals set forth the reason for allowing attorneys fees even though the attorney did not exact a fee:

> "Application of the provision to furnish full recompense for the value of services in successful litigation helps assure the continued availability of the services

to those most in need of assistance..." Id. at 13-14

See also cases cited in Torres, Jordan v. Fusari, 496 F.2d 646, 649 (2d Cir. 1974), and, Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974). The language in Brandenburger is particularly persausive:

> "Thus, an award of attorneys fees to the organization providing free legal services indirectly serves the same purpose of an award directly to a fee paying litigant. See Note, Awards of Attorneys Fees to Legal Aid Offices, 87 Harv.L.Rev. 411 (1973). Of course, the award should be made directly to the organization providing the services to ensure against a windfall to the litigant." Miller v. Amusement Enterprise, Inc., supra, 426 F.2d at 539.

Since the issue has been decided the Court should not review it again in the context of this case.21/

21/ Petitioners assertion at Pet. 49, that an award of attorneys fees would result in a smaller budgetary allocation from the Commonwealth of Pennsylvania to Neighborhood Legal Services next year is without any basis in the record. To the contrary an award of attorneys fees has never resulted in a smaller budgetary allocation to Neighborhood Legal Services.

III. THE COURT SHOULD NOT ISSUE A WRIT OF CERTIORARI ON THE ISSUE OF WHETHER PLAINTIFFS WERE PREVAILING PARTIES SINCE IT IS A FACTUAL QUESTION WHICH WAS RESOLVED AFFIRMATIVELY BY THE DISTRICT COURT AND CIRCUIT COURT OF APPEALS

The Court should not grant certiorari on the issue of whether respondents were prevailing parties. Issues of fact are not generally reviewable, particularly if the District Court's findings received the concurrence of the Court of Appeals. Branti v. Finkel, ____ U.S. ____, 100 S.Ct. 1287 (1980); The Court has often held that:

> "A court of law, such as this Court ... cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271 275 (1949); Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967)

No exceptional show of error exists in this case. The District Justices did not offer any rebuttal to the testimony of John Dineen, lead counsel for the plaintiffs, that the

lawsuit was a material factor in bringing about a cessation of the complained of conduct. Consequently, there is no basis for disturbing the lower court's finding. Therefore, the Court should refuse to grant certiorari since the issue is primarily factual and raises no important questions which should be addressed by this Court.

IV. THE COURT SHOULD DECLINE TO ISSUE A WRIT OF CERTIORARI TO DETERMINE THE APPROPRIATENESS OF ASSESSING ATTORNEYS FEES AGAINST THE GOVERNMENT SINCE THAT ISSUE WAS RECENTLY DECIDED BY THE COURT IN HUTTO v. FINNEY

The issue of whether attorneys fees can be assessed against the government was conclusively decided by this Court in Hutto v. Finney, 437 U.S. 678 (1978). No basis exists for the Court to review that question again in the context of the instant case. As acknowledged by the District Court, the State Court Administrator's Office had fully assumed responsibility for the defense of the District Justices. Similarly the Court of Appeals found:

"Both [the County and the State

> Court Administrator] entered appearance in the District Court and actively participated in all phases of the case."
> Slip Opinion 8

Under such circumstances the assertion that an award of fees against the government in this case violates due process is totally without merit. Further, the issue is not ripe for consideration by this Court, since no award has yet been entered against the County or State Court's Administrator's Office. The Court, therefore, should decline to grant certiorari on the issue of whether an award of attorneys' fees can be assessed against the government.

CONCLUSION

For the reasons set forth above, the Respondents respectfully submit that a Writ of Certiorari should not issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

Timothy P. O'Brien

TIMOTHY P. O'BRIEN, ESQUIRE

CERTIFICATE OF SERVICE

I, TIMOTHY P. O'BRIEN, hereby certify that on December 10, 1980, three copies of Respondents' Brief in Opposition were mailed, postage prepaid, to Thomas W. Pomeroy, Jr., Esquire, Counsel for Petitioners, at Kirkpatrick, Lockhart, Johnson & Hutchison, 1500 Oliver Building, Pittsburgh, Pennsylvania, 15222. I hereby further certify that all parties required to be served have been served.

Timothy P. O'Brien

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